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# THE UNWARY PURCHASER.

A STUDY IN THE PSYCHOLOGY OF TRADE MARK INFRINGEMENT.

ANYONE who has occasion to examine the cases involving trade mark infringement and other forms of unfair trading by the imitation of names, labels, packages and the like, must at once be struck by their irreconcilable conflict. While, of course, the facts in no two cases are alike, this diversity cannot account for the variance in result. The rule of law to be applied is not seriously disputed.

The Lord ORDINARY's definition of infringement, in *Smith* v. *Carron,* 13 R. P. C. 109, 111, can hardly be improved upon:

> "A trade mark is infringed when goods are sent into the market so marked, that in passing from hand to hand, they are liable to be mistaken by ordinary purchasers, not applying their minds very closely to the matter, for the goods of the trader who is the proprietor of the mark."

There are endless modifications of this statement of the law, some more strict, others even more liberal, but there is substantial agreement that infringement occurs, when the marks, names, labels or packages of one trader resemble those of another sufficiently to make it probable that ordinary purchasers exercising no more care than such persons usually do in purchasing the article in question will be deceived.[1]

The person to be considered, the courts say is not the first or

[1] Grezier, v. Autran, 13 R. P. C. 1, 7; Cochrane v. McNish, 13 R. P. C. 100, 106; Reddaway v. Banham, 13 R. P. C. 218, 231; Smith v. The Carran Co., 13 R. P. C. 112; Singer v. Loog, L. R. 18 Ch. D. 412; Powell v. Birmingham Vinegar Co., 12 R. P. C. 519, 13 R. P. C. 245, 256; Seixo v. Provezende, L. R. 1 Ch. 192; Sykes v. Sykes, 3 B. & C. 541; Orr. Ewing v. Johnson, 7 App. Cas. 219; Johnson v. Bauer, 82 Fed. 663; Coats v. Holbrook, 2 Sandf. Ch. 586, R. Cox 20, 31; Taylor v. Carpenter, 2 W. & M. 1, R. Cox 32, 43; Pillsbury v. Pillsbury, 12 C. C. A. 432, 64 Fed. 841, 847; Edge v.

intelligent purchaser, but the ultimate or ordinary purchaser,[2] not the expert[3] or the careful person,[4] but the normal, every day purchaser,[2] or, as some judges have designated him, the unpracticed purchaser,[5] the inattentive purchaser[6] the ignorant purchaser[7] or the unwary purchaser.[8] This last seems to be by far the favorite expression.

The "unwary purchaser" is judicially known to act in certain ways, he has certain duties imposed upon him and there are certain things which he need not do or know. He is not bound to make comparisons between labels or brands and has usually no opportunity to do so.[9] He is likely in making his purchase to act on the

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Johnson, 9 R. P. C. 139; Anglo Swiss Co. v. Metcalf, 3 R. P. C. 32; Wilkinson v. Griffith, 8 R. P. C. 370; Thomson v. Winchester, 19 Pick. 214, R. Cox 7, 10; Clark v. Clark, 27 Barb. 76, R. Cox 206, 208, 26 Barb. 76; Brinsmead v. Brinsmead, 12 T. L. R. 631, 13 T. L. R. 3; Williams v. Brooks, 50 Conn. 278, P. & S. 655, 657; Avery v. Meikle, 81 Ky. 73, P. & S. 753, 763, 778; Dixon Co. v. Guggenheim, 2 Brewst, 335; Brooklyn White Lead Co. v. Masury, 25 Barb. 416; Hodgson v. Kynoch, T. M. R. Sept. '98, p. 210; LePage Co. v. Russia Cement Co., 51 Fed. 944; Brown Chem. Co. v. Stearns, 37 Fed. 360, 363; Cook & Bernheimer v. Ross, 73 Fed. 203; Shepp v. Jones, 15 Pa. Co. Ct. Rep. 59; Gowans v. Ahlborn, 4 Luzerne Leg. Reg. 31, 32; Dixon Co. v. Guggenheim, 7 Phila. 408; Von Mumm v. Frash, 56 Fed. 830; Sparks v. Harper, 3 Queensland, L. J. 158, 201; Cahn v. Gottschalk, 2 N. Y. Supp. 13, 17; Liggett v. Hynes, 20 Fed. 883, 885.

[2] Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357, 366.

[3] Godillot v. American Grocery Co., 71 Fed. 873, 874; Seixo v. Provezende, L. R. Ch. App. 192, 194; Scriven v. North, 134 Fed. 366, 379; Liggett v. Hynes, 20 Fed. 883, 884; Cauffman v. Schuler, 123 Fed. 205; Pinto v. Badman, 8 R. P. C. 183.

[4] Williams v. Brooks, 50 Conn. 278, P. & S. 654, 659; Meriden Co. v. Parker, 39 Conn. 450, 460; Singer Co. v. Wilson, L. R. 3 App. Cas. 376; McCann v. Anthony, 21 Mo. App. 83, P. & S. 1054, 1061.

[5] Blackwell v. Armistead, 3 Hughes 163, F. C. 1474, p. 548.

[6] Kinney v. Maller, 6 N. Y. Supp. 389.

[7] Bissell v. Bissell, 131 Fed. 357, 366, "ordinary purchasers include incautious, unwary and ignorant purchasers." Cochran, D. J.

[8] Battle v. Finlay, 45 Fed. 796, 798; Liebig's Extract of Meat Co. v. Chemists Co-Op. Co., 13 R. P. C. 644, C. A., 13 R. P. C. 736; Tea Co. v. Herbert, 7 R. P. C. 684; Celluloid Co. v. Cellonite Co., 32 Fed. 94, 97; Amoskeag v Spear, 2 Sandf. 607; Pillsbury v. Pillsbury, 64 Fed. 641; Wirtz v. Eagle Bottling Co., 24 Atl. 658, 659; Centaur v. Robinson, 91 Fed. 889; Draper v. Skerrett, 116 Fed. 206, 209; McLean v. Fleming, 96 U. S. 254, 256; Powell v. Birmingham, 13 R. P. C., 235, 258; Godillot v. American Grocery Co., 71 Fed. 873, 874; Blackwell v. Armistead, 3 Hughes 163, F. C. 1474; Gorham v. White, 14 Wall 1511; Meriden Co. v. Parker ,39 Conn. 450; Potter v. Miller, 75 Fed. 656; Regis v. Jaynes, 185 Mass. 458, 70 N. E. 480, 481; Fairbank v. Bell, 77 Fed. 869, 871; Colman v. Crump, 70 N. Y. 573, 578; Somerville v. Schrembi, 4 R. P. C. 179, 183; Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 120; Boardman v. Britannia Co., 35 Conn. 402; Williams v. Brooks, 50 Conn. 278, 282, 283, P. & S. 654, 659; Singer Co. v. Wilson, L. T. 3 App. Cas. 376; Drummond Co. v. Addison, 52 Mo. App. 10; Steinway v. Henshaw, 5 R. P. C. 77; Cauffman v. Schuler, 123 Fed. 205, 206; McCann v. Anthony, 3 West. Rep. 436, 21 Mo. App. 83; Fairbank v. Luckel, 102 Fed. 327, 332; Mumm v. Frash, 56 Fed. 830; Swift v. Dey, 4 Robt. 611, R. Cox 318, 321; Lanahan v. Kissell, 135 Fed. 889, 902; Frazer v. Nethersole, 4 Kyshe, 269, 273; Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880, 882.

[9] Scriven v. North, 134 Fed. 366, 379, it was here remarked "It is to be remembered that a purchaser of an article of general use, which in the course of years has come

moment[10] and is not bound to study or reflect,[11] to analyze labels or packages,[12] or to read or examine them.[13] He is not bound to remember more than the general features of a mark, brand or label and is not expected to have in mind the details.[14] He is not supposed to know that imitations exist.[15] The courts recognize that he has not had the experience of an equity judge in analyzing the elements which make up the general appearance of a package.[16] Some courts indeed have gone so far as to hold that he has a right to be careless [17] and that the use of a mark or label will be enjoined where deception is a probable or even a possible consequence.[18]

The setting of the stage upon which the unwary purchaser performs is a proper subject of judicial inquiry, therefore evidence of the customary manner of exposing the goods in question for sale, is competent.[19] The names and manner of familiar identification of the article,[20] and evidence of the characteristics of the unwary purchaser himself will be received, whether he is intelligent or the

to be known as of superior quality, and recognized by certain catch words and certain visible marks, may be easily deceived into buying articles of inferior quality, designated by words of similar signification and superficially resembling the genuine; for he does not usually have the opportunity of seeing the genuine and the imitation side by side. He commonly has in mind only the characteristic features in the designation and appearance of the article he wishes to buy, and is exposed to imposition if the imitation, though slight, is of those salient features, and thus the reputation and good will established by years of advertising and production of articles of superior quality would be frittered away, if inferior goods, sufficiently resembling the genuine to be mistaken for them, are put on the market and readily sold as and for the genuine. The imitation goods may not be identical in any one feature, but, if similar in all and designated by similar marks and similar catchwords, the sale should be enjoined, or the imitation permitted only under such limitations as will prevent misapprehension on the question of its real character, and so differentiated that the public will not be imposed on or the complainant defrauded." Stuart v. Stewart, 91 Fed. 243, 245; Pillsbury v. Pillsbury, 64 Fed. 841, 847; Western Grocer Co. v. Caffarelli Bros., Tex. Civ. App. 108 S. W. 413, 415.

[10] Paris Medicine Co. v. Hill, 102 Fed. 148, 151.

[11] Pillsbury v. Pillsbury, 64 Fed. 841, 847.

[12] Cantrell v. Butler, 124 Fed. 290.

[13] Kostering v. Seattle Brewing Co., 116 Fed. 620; International Silver Copr. v. Rogers, 60 Atl. 187, 188.

[14] Little v. Kellam, 100 Fed. 353, 354; Cantrell v. Butler, 124 Fed. 290; Kostering v. Seattle Brewing Co., 116 Fed. 620; Scriven v. North, 134 Fed. 366, 379.

[15] Centaur Co. v. Link, 49 Atl. 828, 830; Wellman v. Ware, 46 Fed. 289.

[16] Fairbank v. Bell, 77 Fed. 869, 876.

[17] Pillsbury v. Pillsbury, 64 Fed. 841, 847; Little v. Kellam, 100 Fed. 353; Draper v. Skerrett, 116 Fed. 206, 212; Colman v. Crump, 70 N. Y. 573, 578; Brown v. Seidel, 153 Pa. 60, 25 Atl. 1064, Mitchell, J., dissenting; McCann v. Anthony, 3 West. Rep. 436, P. & S. 1061.

[18] Dixon v. Guggenheim, 2 Brewst. 321, R. Cox 559, 563; Amoskeag v. Spear, 2 Sandf. Sup. Ct. 599, R. Cox 87, 95; In re U. S. Mercantile Rep. Co., 21 N. E. 1034; Clement v. Maddick, 1 Gif. 98, 65 Full Reprint, 841, 842.

[19] Grezier v. Autran, 13 R. P. C. 1, 7; Cochrane v. McNish, 13 R. P. C. 100, 106.

[20] Hires v. Consumers Co., 100 Fed. 809; Barber v. Manico, 10 R. P. C. 93, 96, 97; Grezier v. Autran, 13 R. P. C. 1, 7; Faulder v. Rushton, 22 R. P. C. 477, 484.

reverse, educated or illiterate, what may be his age, whether a child or mature and his station in life.[21] Objectively the unwary purchaser is pretty comprehensively investigated. Subjectively, however, he seems to have been wholly neglected, and I believe that the irreconcilable conflict among the decisions is due to this neglect.

The question of the likelihood of deception is however one which the courts reserve for their own determination.[22] The first and not infrequently the only step is an inspection by the court of the respective marks.[23] For the purpose of this inspection the marks are, of course, placed side by side and the defendant's astute counsel is at hand to point out and dwell upon such differences between the two as may exist. This is a privilege which the "unwary purchaser" is denied, he does not know that there are two marks, still less has he an opportunity to make a side by side comparison, and he has not the assistance of able counsel to help him discriminate. Some courts recognize this and have said so,[24] but it must unconsciously have its effect and by suggestion tend to accentuate the difference.

Equity judges certainly are better equipped mentally than the

[21] Powell v. Birmingham Co., 12 R. P. C. 517; Edge v. Johnson, 9 R. P. C. 139; Re Christiansen's T. M., 3 R. P. C. 60; Morse v. Worrell, 10 Phila. 168; P. & S. 11, 12; Swift v. Dey, 28 How. Pr. 206, 4 Robt. 611, R. Cox 318, 320, 321; Royal Co. v. McQuade, P. & S. 401; Fleischmann v. Schuckmann, P. & S. 541, 543; Talcott v. Moore, 6 Hun 106; Hodgson v. Kynoch, T. M. R. Sep. 1898, p. 208; Simmons v. Simmons, 81 Fed. 163; Liggett v. Hynes, 20 Fed. 883, 884, P. & S. 901; Kostering v. Seattle Brew. Co., 116 Fed. 620; Ohio Bakery Co. v. National Biscuit Co., 127 Fed. 116, 120; Wirtz v. Eagle Bottling Co., 24 Atl. 658, 659; Drummond v. Addison Tinsley Tob. Co., 52 Mo. App. 10; Sperry v. Percival Milling Co., 81 Cal. 252, 260; Standard Table Oil Cloth Co., v. Trenton Oil Cloth & Linoleum Co., 63 Atl. 846, 848; Parlett v. Guggenheimer, 67 Md. 542, 10 Atl. 81, 83; Metzler v. Wood, L. R. 8 Ch. 606, 30 L. T. (N. S.) 541, 543; Fairbanks v. Bell, 77 Fed. 869, 871.

[22] N. C. & Manchester Brewing Co. v. Manchester Brewing Co., L. R. [1899] A. C. 83; Lambert v. Goodbody, 19 R. P. C. 377, 382; Payton v. Snelling, L. R. [1901] A. C. 308, 311, 17 R. P. C. 628, 635; Addley Bourne v. Swan, 20 R. P. C. 105, 118; Royal Ins. Co. v. Midland Ins. Co., 25 R. P. C. 728, 733.

[23] Wirtz v. Eagle Bottling Co., 24 Atl. Rep. 658, 660; Fruit Jar Co. v. Thomas, Fed. Cas. 3131; Von Mumm v. Frash, 56 Fed. 830, 838; Liggett v. Hynes, 20 Fed. 883, 885; Coats v. Thread Co., 149 U. S. 562; Blackwell v. Armistead, F. C. 1474, p. 548; In re Christiansen's T. M. 3 R. P. C. 54, 62; Holdsworth v. McCrea, L. R. 2 Eng. & Ir. App. 380; Hecla Foundry Co. v. Walker, 6 R. P. C. 554; Payton v. Snelling, 17 P. C. 628, L. R. [1901] A. C. 308, 311; N. C. & Manchester Brewery Co. v. Manchester Brewery Co. L. R. [1899] A. C. 83; Lambert v. Goodbody, 19 R. P. C. 377, 383; Addley Bourne v. Swan, 20 R. P. C. 105, 118, [1903] I Ch. 229; Morse v. Wortell, 10 Phila. 168, P. & S. 8; Filley v. Fassett, 44 Mo. 173; Gail v. Wackerbarth, 28 Fed. 286; Drummond v. Addison, 52 Mo. App. 10; Joseph Dixon Co. v. Benham, 4 Fed. 527; Drewry v. Wood, 127 Fed. 887, 889; Gillett v. Lumsden, 3 Can. Comm. L. Rep. 409, 413. "The result is that unless it is left to the eyesight of the Judge to judge for himself, there is practically no evidence open to the plaintiff in an action of this sort." Farwell, J. in Addley Bourne v. Swan, 20 R. P. C. 105, 118.

[24] Enterprise Manfg. Co. v. Landers, Frary & Clark, 124 Fed. 923, 928; J. W. Thorley's Cattle Food Co. v. Massam, 42 L. T. (N. S.) 851, 857.

average run of people and their training tends to make them more inclined to analyze and discriminate. Unconsciously the judge projects his mentality on to that of the "unwary purchaser" so that this mythical person becomes judicially quite a different individual from the one which he is in fact and is transformed into what the court thinks he ought to be, and more frequently still what the court himself is. This metamorphosis of the unwary purchaser is all in the direction of greater care and greater ability to discriminate. The illiterate consumer of plug tobacco, as he is in fact, would in all probability not recognize himself if he were suddenly confronted with the person whom the court strives to protect from imposition in a trade mark case involving tin tags. His judicially injected intelligence and perception would doubtless astonish him. Courts cannot help endowing the unwary purchaser with a part of their own intellectuality and regard with impatience evidence which seeks to credit him with less.

Mr. Justice FARWELL'S remarks on this subject are typical: "They" (the trade witnesses called) he observed, "are not experts in human nature, nor can they be called to give such evidence, and apart from admissibility, one cannot help feeling that there is a certain proneness in the human mind to think that other people are perhaps more foolish than they really are. I do not think that Carlyle is alone in his estimate of the inhabitants of these islands."[25]

The remarks of the Master of the Rolls in *Re Christiansen's Trade Mark,* 3 R. P. C. 54, 60, illustrate how a choleric judge considers evidence in these cases:

> "But now let us consider how you are to use that evidence. It is quite true that you must not try it exclusively by your eyes. It is equally true to my mind that you must not try it exclusively by the evidence. You must use both. You are called upon to decide what in your belief and conscience you think as to whether one thing is so like another as that it will be calculated to deceive; and, as you are an intelligent being yourself, or supposed to be, you must use your eyes and your thoughts, and not go blindly and act upon evidence which is given by people. Therefore, you must look upon it with your eyes and with your own powers of thought and opinion accompanied with, and, if the evidence is satisfactory to you, directed by the evidence which is given. But when you come to consider the evidence, you, being the person to decide on the effect of it, must not only look at

[25] Addley Bourne v. Swan, 20 R. P. C. 105, 118.

> what people say, but you must exercise your own opinion as to whether what they are saying is sensible or can be accepted. If a man was to come and tell me that a horse was like a cat, he might swear to it, and you might get fifty persons to swear to it, but I should not act on such evidence, because it is pure nonsense; and if people come and tell me that all the natives of India are of the same class of intelligence, and some people think they are all exceedingly sharp, and some think that they are all exceedingly stupid, I have a right to bring my own knowledge of the world into play; I have a right to bring to bear that knowledge which all educated people have who have read about India or who have known the history of India, and to say that such evidence is simply absurd. When you have all the different castes in India, and the actually different nationalities; when you have all the different educations which we know exist, and there is the highest class of education, and we know that there are people without any education at all; we know that there are human beings made in the same way, although not of the same colour as we are, why it is simply absurd to come and tell anybody with sense in his head that the intelligence of all these people must be equal. There are some of them as clever as any Europeans, and some of them more clever, and some of them as stupid as any Europeans, and I suppose it is difficult to be more stupid. Therefore, that evidence cannot be received."

Judicial impatience is not surprising when one considers what this "evidence" usually consists of. The transcript of trade testimony in some of these cases reads like an extract from "Alice in Wonderland."

"'What do you know about this business?' the King said to Alice."

"'Nothing,' said Alice."

"'Nothing whatever?' persisted the King."

"'Nothing whatever,' said Alice."

"'That's very important,' the King said, turning to the jury. They were just beginning to write this down on their slates."

* * * * * *

"The Red Queen shook her head. 'You may call it nonsense if you like,' she said, 'but I've heard nonsense compared with which that would be as sensible as a dictionary."

Perhaps the Red Queen had listened to trade evidence in a case

of unfair competition. For example, J. Wellington Wells, a retail tobacconist is placed upon the stand by the complainant in a suit to restrain the alleged infringement of a tobacco brand. He states the length of time he has been in business, that he is familiar with the trade and knows how people who deal with him ask for what they want. He sells complainant's "Red Dog" tobacco.

Q. State please how your customers ask for it.

A. They come in and say "Gimme some Red Dog" or "a five cent package of Red Dog," sometimes they just throw down their money and point to it.

Q. Are the packages placed where customers can readily see them?

A. Sure, right behind the counter on a shelf.

Q. Is the light in your store good?

A. It depends on the weather, sometimes it is, and then again sometimes it isn't.

Q. How much time is usually spent in making a purchase?

A. It all depends on how much of a hurry the man is in sometimes one will come in and buy a package, fill his pipe, light up, pass the time of day and take his time about it, and the next man will act as if he had to catch a train.

Q. Are the consumers of Red Dog intelligent or otherwise?

A. Both.

Q. Among your customers are there any who cannot read or write?

A. I don't know, I guess so. A good many are colored people and some are ginneys working on the railroad, and I don't believe they can read or write.

Q. Have you ever dealt in defendant's tobacco "Red Coon" and if so, please state whether or not you have observed any instances where buyers have purchased it as complainant's "Red Dog" tobacco?

This question invariably precipitates a flood of tobacco store gossip and anecdote, and since the witness' deposition is usually taken before a commissioner, who has no power to exclude anything and who is being paid by the page and consequently has no desire to do so, the length of the answer depends on the witness' conversational facility, which, in a retail tobacconist, is usually good—and the ability he thinks he has to guess what is going on inside of his customers' heads,—his clairvoyance in this respect being well developed.

While this is not a quotation from a real transcript, it is not exaggerated. Testimony not a bit better than this fills the records

in unfair trade cases. As proof of facts, it is, of course, worthless, but it enables the judge to decide a case about as he pleases and makes anything like uniformity of decision impossible. Based on such evidence it is no wonder that some of the court's opinions sound like Captain Jack Bunsby's.

The ultimate purchaser being the person considered, evidence as to his habits and conduct must, of course, be obtained from those who come in contact with him, that is to say the small shop-keeper, his assistant, or, in the large establishments, the clerk behind the counter. These people, whatever their intelligence may be, are certainly not trained to observe correctly, to think accurately or clearly to express what they see or think, and frequently their ignorance is abysmal.

Then there is the "unwary purchaser" himself. Probably he knows less about his own mental processes than anybody. He thinks himself infinitely more acute than he is, he is disposed to resent interrogation and suspect that he is being made sport of, and finally the courts pay no attention to his own estimate of himself.

"It only remains then," said Mr. Justice FARWELL, in a recent case[25] "to call the evidence of people who say that they themselves would be deceived. Now it is obviously extremely difficult to get any such evidence. Nobody quite likes to admit that he is so extremely foolish, as in many cases he would have to do. * * * I have referred to the decision of Vice Chancellor MALINS. He disregarded the positive testimony of a lady who said she had been deceived, and said that really, looking at the two marks, it was impossible."

Of course the most convincing evidence that a mark is calculated to deceive would seem to be the testimony of people who have actually been misled by its use and purchased the defendant's product believing they were purchasing complainant's. It would seem that such evidence exhibited the "unwary purchaser" as he is and in action, and so it does, if the court happens from an examination of the exhibits to be of opinion that the witness was justified in being fooled, that is, if the ideal and judicially constructed "unwary purchaser" coincides with the actuality; if not a writ *de lunatico inquirendo* is suggested as more appropriate than a writ of injunction, or the unfortunate one is reviled in some such terms as these , "The law is not made for the protection of degenerates and paranoiacs, but for the general public, composed of men with ordinary common sense and with faculties unimpaired,"[26] "purchasers * * *

[26] Hilson Co. v. Foster, 80 Fed. 896, 898.

could not be deceived * * * unless they were afflicted with partial blindness, or arrested mental development or an unusually heedless disposition. The law cannot take cognizance of conditions so abnormal,"[27] (in a case about a champagne capsule), "If the vendor happened to be a knave and the purchaser an imbecile, all manner of imposition might be practiced, especially if previous potations had combined with nature to make the latter oblivious to surrounding circumstances. For such conditions, however, the defendant is not responsible."[28]

On the other hand, when the court thinks the exhibits sufficiently alike that a judicially ideal unwary purchaser ought reasonably to be deceived and one steps forward and testifies that it has happened, it is hailed as confirmation of the court's judgment and much is made of the testimony,[29] but if in such a case no testimony of actual deception is adduced the "unwary purchaser" is pressed again into service on the pretext that he is in the course of his imaginary purchasing likely to be imposed upon by the imitation,[30] and that it is difficult to find people who have been fooled, for if the deceit is effective the man who is cheated does not know it and the complainant can hardly be expected to discover such a person, and if the victim does discover the imposition he is likely to be so chagrined that he will not admit it.[31] There is no escape from such logic or from the conclusion that judicially the "unwary purchaser" is a mere abstraction, a myth.

This is not as it ought to be. Cases in which the "unwary purchaser" figures are intensely practical and have to do with live issues, affecting live people. The unwary purchaser is a real person and not a Colonel Bogey. He is the average individual endowed with certain faculties and possessed of certain failings. Modern applied psychology has been experimenting with people ever since the advent of the present day scientific laboratory methods, and I

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[27] Philadelphia Novelty Co. v. Rouss, 40 Fed. 585, 587.

[28] Mumm v. Kirk, 40 Fed. 589.

[29] Liebig's Extract of Meat Co. v. Chemists Co-Op. Soc., 13 R. P. C. 635, 644; Enterprise Manfg. Co. v. Landers, 124 Fed. 923, 927; Clement v. Maddick, 1 Giff. 98, 65 Full Reprint 841.

[30] Fuller v. Huff, 104 Fed. 145; Lanahan v. Kissell, 135 Fed. 899, 903; Baker v. Puritan Co., 139 Fed. 683; Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658, 659; Taendsticks Fabriks v. Meyers, 139 N. Y. 367, 34 N. E. 904, 905; Walker v. Hochstaedter, 86 Fed. 776, 777; Von Mumm v. Frash, 56 Fed. 830; Law v. Fels, 35 Fed. 361; Smith v. Carron, 13 R. P. C. 111; Sawyer v. Kellogg, 7 Fed. 720, Price & Stewart, 493, 494; Tobacco Co. v. Commerce, 45 N. J. L. 18, P. & S. 705, 707; O'Donnell v. National Water Co., 161 Fed. 545; Rushmore v. Saxon, 158 Fed. 499, 506; Eckhart v. Consolidated Milling Co., 72 Ill. App. 70.

[31] Rushmore v. Saxon, 158 Fed. 499, 506; Addley Bourne v. Swan, 20 R. P. C. 105, 118.

supposed that I had only to turn to any of the recognized works on the subject and find, under the head perhaps of the psychology of recognition, tabulated results of experiments that would enable me to show that the observation, perception and memory of enough normal people had been investigated, that the conclusions could safely be accepted as representing the capacity in these respects of the generality of mankind. In short I hoped to be able to find that the average person had been investigated, and since our elusive friend the unwary purchaser *is* the average person, I expected to find tabulated some of the characteristics of the unwary purchaser as he really is. I searched in vain. I found a little that seemed to approach the subject but nothing that could be said to exhaust or even partially to answer the question.[32] I then (in January, 1909) wrote a letter to Professor Hugo Münsterberg introducing the unwary purchaser stating my difficulty and asking for light.

The answer came promptly—"Your letter is of very high interest to me, and I acknowledge gladly that you have there turned my attention to a field of applied psychology which is evidently completely neglected so far. There is indeed no reason why this whole group of problems should not be transformed into straight experimental questions. * * * I wish you would supply me, that is, this laboratory with some sets of labels and their imitations."

This I very gladly did. The material was acknowledged thus: "I now have your two letters, your express box, the samples of imitations and your package with labels, and today I only beg to thank you for this most welcome material. * * * You certainly have given to psychology a most interesting stimulus and you are perfectly right in saying that there exists nothing to the point in the literature of experimental psychology."

Professor Münsterberg, assisted by Mr. Foote of Harvard University, is working on the problem by laboratory methods, and I am in hopes that when the investigation is completed the unwary purchaser will stand before us as he really is.[33]

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[32] Studies in Memory, Peterson; Psychological Review 1894, Vol. I, p. 602; Stern's Fourteenth Rule; Titchener Experimental Psychology Part I, p. 110; Id. Part II, 391, 392; "On the Witness Stand," Münsterberg, p. 28.

[33] See McClure's Magazine, Nov., 1909, p. 87, 93, "Psychology and the Market" by Professor Münsterberg for a restatement of the question from a psychologist's standpoint.